A REFLECTION ON THE CONSTITUTIONAL POWER OF THE ATTORNEY-GENERAL TO ENTER A *NOLLEPROSEQUI* IN NIGERIA

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Abstract

The Constitution of the Federal Republic of Nigeria 1999 (as amended) bestows on the Attorney-General the power to enter a nolleprosequi in criminal proceedings. Since the coming into force of the Constitution on 29 May 1999, some Attorneys-General in Nigeria have hidden under the Constitution to discontinue criminal proceedings against persons standing trial in court for serious criminal offences through the exercise of the constitutional power of nolleprosequi for their selfish interest or political considerations or selfish or vested interest of Nigerian leaders or other interests other than the interest of justice, contrary to section 174(3) or section 211(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).This article reflects on the constitutional power. The research methodology adopted is mainly doctrinal analysis of applicable primary and secondary sources. It is the author's view that the exercise of the constitutional power above for the selfish interest or political considerations of the Attorney-General is

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unconstitutional. The author suggests the subjection of the exercise of the constitutional power to the permission of the court in line with the approach in other countries, including the United States of America (USA) and Kenya.

Key-words: Attorney-General, *Nolleprosequi,* Public interest, Interest of justice, Abuse of legal process.

Introduction

The Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution)[1], hinged on the presidential system of government, came into effect on 29 May 1999, signaling the beginning of Nigeria's fourth Republic. 'Attorney-General' can be defined 'as the Chief Law Officer of a State responsible for advising the government on legal matters and representing it in litigation'.[2]

Many constitutions of States, including the USA,[3] the United Kingdom (UK)[4] and Nigeria[5] establish the Office of Attorney-General as the Chief Law Officer of the country or a Region or State in a country as well as a Minister or Secretary of the Government of the country or Commissioner for Justice of the Government of the Region or State. While the National Attorney-

1 Cap C 23 Laws of the Federation of Nigeria (LFN) 2004.

2 See BA Garner (ed), *Black's Law Dictionary* (St Paul: 8th edn, West Publishing Co., 2004) 139.

3 It is a country from where Nigeria copied its presidential system of government as well as a country practicing the common-law.

4 It is a nation practicing the common-law as well as the cabinet or parliamentary system of government.

5 It is a country practicing the common-law.

General's jurisdiction dovetails to all the nooks and crannies of the country, the Regional or State Attorney-General's jurisdiction is confined to the Region or State in which he is serving. To be specific, Section 150(1) of the Constitution provides:"There shall be an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation".[6]

Needless to emphasise that the baton of office held by an Attorney-General is dual in capacity in many States, as indicated above. His appointment is a mixture of professionalism and politics. In actuality, he performs in many countries legal functions as the Chief Law Officer of the country or a Region or State, Chief Prosecutor and guardian of the public interest as well as political functions of the Minister or Secretary of Justice or Commissioner for Justice of a Region or State as the Chief Legal adviser of the government of the day with responsibility for criminal justice policy. Thus, he acts as law officer as well as a politician and member of the Executive Council.[7]

The common law and constitutions of many countries, including Nigeria provide for the legal functions of the Attorney-General. For example, section 174 of the Constitution, which contains the legal

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[6] See, also, s 195(1) of the Constitution which creates the office of Attorney-General of a State who shall, also, be the Chief Law Officer of a State and Commissioner for Justice of the Government of a State

[7] FO Damola, 'The Position and Power of an Attorney-General in a Democracy: An injustice in the Administration of Justice in Nigeria' (2016) 2(1) *Port Harcourt Journal of Business Law* 243.

functions of the Attorney-General of the Federation of Nigeria[8] provides as follows:

> (1) The Attorney-General of the Federation shall have power-
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> (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by or under any Act of the National Assembly;
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> (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
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> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
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> (2) The powers conferred upon the Attorney-General of the Federation under sub-section (1) of this section may be exercised by him in person or through officers of his department.
>
> (3) In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of Justice and the need to prevent abuse of legal process.[9]

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[8] Note that s 211(1) of the Constitution contains the legal functions of the Attorney-General of a State.

[9] S 174(1), (2), & (3) above is the same in wordings with s 211(1), (2), & (3) of the Constitution which contains the legal functions of the Attorney-General of a State, except that he is empowered to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than

A note-worthy point that has been indicated before is that the Attorney-General is the Chief Prosecutor in many countries. As Chief Prosecutor, the Attorney-General is, also, imbued with the authority to discontinue at any stage before judgment is delivered any criminal proceedings instituted by him or any other authority or person. This is the power to enter a *nolleprosequi*, as can be clearly discerned from the provisions of section 174(1)(c) above. The expression *nolleprosequi* which is abbreviated to *nol or nolle pros* is a legal Latin expression.[10]In the Nigerian case of *The State v AdakoleAkor and Others*,[11]Idoko, J defined *nolleprosequi*as meaning: 'I am unwilling to prosecute or unable to proceed or continue with prosecution'. Needless to mention that the Attorney-General exercises the power of *nolleprosequi* by stating personally in court that the Crown or State intends that the criminal proceedings shall not continue or by giving information to the court in writing that the Crown or State intends that the criminal proceedings shall not continue.[12]

It is disappointing that since the coming into force of the Constitution on the date above, some Attorneys-General in Nigeria have hidden under the Constitution to free persons standing trial in court for serious criminal offences through the exercise of the constitutional power of *nolleprosequi* for their selfish interest or political considerations or selfish or vested interest of Nigerian leaders or other interest other than the interest of justice, contrary to section 174(3) or section 211(3) of the Constitution above.

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a court martial, in respect of any offence created by or under any law of the House of Assembly of his State and the same is to operate within his State.

10 <https://en.m.wikipedia.org.wiki> accessed 23 April 2020.

11 [1981] 2 SCNLR 410, 414 or [1981] 2 NCLR 410, 718.

12 Damola, see n 7 above,248.

The National Assembly of Nigeria (NAN) is to blame for allowing this problem to emerge, as its enactment, that is the Constitution does not expressly subject the exercise of the power of *nolleprosequi* by the Attorney-General to the control or permission of the court or anybody or authority. This Lacuna in the Constitution would not augur well for the system of administration of criminal justice in Nigeria, as it is prone to abuse as has been the case since the coming into force of the Constitution. The entering of a *nolleprosequi* in criminal proceedings by Attorneys-General has adverse effect on some victims of crime or complainants or accused persons or private prosecutors or close relatives of the victims of crime. For instance, it has led to loss of time and money of the complainant and accused person or persons, already expended at the time when the accused person or persons was or were discharged upon the entering of a*nolleprosequi* in the criminal proceedings by the Attorney-General, contrary to the fundamental right of a citizen of Nigeria, including an accused- Nigerian citizen, to own property, as guaranteed under sections 43 and 44(1) of the Constitution.

Also, it has engendered the denial of the fundamental right of the complainant and accused person or persons to a fair hearing, contrary to the right to a fair hearing guaranteed by the common-law rules of natural justice, namely *audialterampartem*, meaning 'hear the other side of a case' and *nemojudex in causasua*, meaning 'no man should be a Judge in his own cause or case' , section 36(1) of the Constitution, Article 7 of the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981 and Article 14(1) of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) 1966.

Furthermore, it has brought about the denial of the right of some Nigerian private prosecutors to participate in the Government of Nigeria directly through accessibility to the court, take part in the conduct of public affairs directly, and participate freely in the government of their country directly in accordance with the provisions of law, contrary to sections 14(2)(c) as well as 17(2)(e) of the Constitution, Article 25 of the ICCPR, and Article 13(1) of the ACHPR, respectively. A lot of people are actually upset by this ugly situation. Worse still, the Attorneys-General who exercise the constitutional power above wrongly are not being dealt with or removed from office by the Nigerian Government.

This article reflects on the power of the Attorney-General to enter a*nolleprosequi* under the Constitution. It analyses applicable laws. It takes the position that the exercise of the constitutional power of *nolleprosequi* by the Attorney-General in Nigeria for his selfish interest or political considerations and so on is amoral, against legal ethics or unethical, unconstitutional, and unlawful and, therefore, ought to be subjected to the permission of the court in Nigeria. It highlights the practice in other countries. It offers suggestions and recommendations, which, if implemented, could eradicate the problem of some Attorneys-General in Nigeria exercising the constitutional power of *nolleprosequi* for their selfish interest or political considerations and so on rather than in the public interest, the interest of justice and the need to prevent abuse of legal process.

Brief history of the power of the Attorney-General to enter a *nolleprosequi* in Nigeria

In this segment, the discussion shows that the exercise of the power of the Attorney-General to enter a *nolleprosequi*in Nigeria dates back to the period when Nigeria was under British colonial rule.

Nigeria came into being on 1 January 1914, following the amalgamation of the Colony of Lagos and Protectorates of Southern and Northern Nigeria to constitute the Colony and Protectorate of Nigeria by Lord Fredrick Lugard who was appointed the first Governor-General of Nigeria by the British colonial master of Nigeria.[13] The Law Officer Ordinance 1951 provides that the Crown Legal Advisers are entitled to practice in courts of Nigeria, ex officio from 1 October 1936.[14] Indeed, the Offices of the Attorney-General, Solicitor-General, Regional Attorney-General and Crown Counsel were created under the Law Officer Order[15] 1951 and Law Notes[16] 1955. It was on 1 October 1960 that Nigeria was granted independence by Britain under the Parliamentary Nigeria (Constitution) Order in Council[17] 1960. In 1963, the country became a Republic. The nation's first Republic can be considered to have started on 1 October 1963 under the 1963 Parliamentary Republican Constitution. It is note-worthy that the 1960 Nigerian Parliamentary Constitution and Regional Parliamentary constitutions removed all the common-law powers of the Attorney-General with respect to the prosecution of criminal cases and the discontinuance of the same and bestowed the said powers on the Federal and Regional Directors of Public Prosecutions, respectively.[18] Owing to this development, the

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13 See AE Abuza, 'A Reflection on the Regulation of Strikes in Nigeria' (2016) 4 (1) *Commonwealth Law Bulletin* 6.

14 See Cap 100 Laws of the Federation of Nigeria and Lagos (Revised Edition) 1958.

15 No 47 of 1951.

16 No 1 of 1955.

17 No 1652 of 1960.

18 See, for example, s 97 of the 1960 Parliamentary Constitution of the Federation, s 48 of the Parliamentary Constitution of Northern Region and s 47 of the Parliamentary Constitutions of Western and Eastern Regions.

Director of Public Prosecutions (DPP) became the only civil servant imbued with such enormous powers. Fortunate enough, they could not be removed from office without following some long and cumbersome process under the Civil Service Rules.[19]

On its part, the 1963 Parliamentary Republican Constitution removed the control of criminal prosecutions from the hands of the DPP and returned it back to the Attorney-General, as was the case under the common-law. It goes further to make the hitherto, meaning before now, independent office of the DPP sub-ordinate to that of the Attorney-General.[20] In fact, the Constitution above establishes the Legal Department to be headed by the Attorney-General with the DPP made responsible to the same.[21] Sub-sections (2), (5), and (6) of section 104 of the Constitution above, with equivalent provisions in the Regional constitutions, are significant. Section 104(2)(a), (b) and (c) of the Constitution above are similar in wordings to section 174(1)(a),(b) and (c) of the Constitution, as disclosed earlier. Sub-section (5) of section 104 above is to the effect that the powers conferred on the Federal Attorney-General by sub-section (2)(b) and (c) shall only be exercised by him and any other person or authority is permitted to withdraw criminal proceedings instituted by the same at any stage before the person against whom the proceedings have been instituted has been

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[19] See, for example, Rule 04107(1)-(XVII) of the Federal Civil Service Rules, as revised up to 1 April 1974 made pursuant to s 150(1) of the Constitution of the Federation 1960.

[20] See the Parliamentary Constitution of the Federation No 20 of 1963, s 104; Parliamentary Constitution of Northern Nigeria No 33 of 1963, s 49; Parliamentary Constitution of Western Nigeria No 26 of 1963, s 47; Parliamentary Constitution of Eastern Nigeria No 8 of 1963, s 49; and Parliamentary Constitution of Mid-Western Nigeria No 3 of 1964, s 47.

[21] *Ibid.*

charged before the court. While sub-section (6) of section 104 above is to the effect that in the exercise of the powers bestowed on the Federal Attorney-General by section 104 above, he shall not be subject to the direction or control of any other person or authority.

The Constitution of the Federal Republic of Nigeria 1979 [22] makes provisions for the prosecution and discontinuance of criminal proceedings by the Federal and States' Attorneys-General.[23] It is significant to put on record that the 1979 Presidential Constitution is, in actuality, the same with the 1963 Parliamentary Republican Constitution, regarding the powers of the Attorney-General, except for minor differences in sub-sections (2) and (3) of sections 160 and 191 of the same. To be specific, sub-section (2) of section 160 above provides that the powers conferred on the Federal Attorney-General under section 160(1) may be exercised by him in person or through officers of his department. While sub-section (3) of section 160 above provides that in the exercise of his powers under section 160 above, the Federal Attorney-General shall have regard to the public interest, the interest of Justice and the need to prevent abuse of legal process. Of course, the 1979 Presidential Constitution, unlike its predecessors, provides what seems to be a safeguard for the prevention of misuse of the Attorney-General's powers of prosecution and discontinuance of criminal proceedings in sub-section (3) of sections 160 and 191 above.

Furthermore, the Constitution makes provisions for prosecution and discontinuance of criminal proceedings by the Federal and State Attorneys-General in sections 174 and 211 of the same, as disclosed earlier. Indeed, it retains the provisions of sections 160

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22 Cap 62 LFN 1990.

23 *Ibid.,*ss 160 & 191.

and 191 of the 1979 Presidential Constitution. In this way, the provisions of sections 174 and 211 above are the same with sections 160 and 191 of the 1979 Presidential Constitution.

Over the years, the constitutional power of the Attorney-General to enter a *nolleprosequi* in criminal proceedings has been misused in that the same has been utilised by some Attorneys-General for their selfish interest or political considerations and so on. A cardinal point to make at this juncture is that the exercise of the constitutional power of *nolleprosequi*in criminal proceedings by some Attorneys-General for their selfish interest or political considerations and much more, as disclosed above is not peculiar to Nigeria. It is in accord with what obtains in other countries, including the USA, the UK and Kenya a country practicing the common-law and the presidential system of government.

Analysis of case law on the power of Attorney-General to enter a *nolleprosequi*under the 1999 Nigerian Constitution

The courts in Nigeria have discussed the power of the Attorney-General to enter a *nolleprosequi* under sections 174(1)(c) and 211(1)(c) of the 1999 Nigerian Constitution in so many cases. A discourse on a few selected cases would suffice in this segment.

One selected and important case in point is *The State v Adakole Akor and Others*.[24] In the case, the Attorney-General of Benue State had entered a *nolleprosequi* in writing to free 27 accused persons, that is the respondents/accused standing trial at the High Court of Benue State, relying on section 191(1)(c) of the 1979 Presidential Constitution (now section 211(1)(c) of the Constitution). After hearing arguments by counsel on both sides

[24] See n 11 above.

whom the Court above, suomotu, meaning 'on its own motion', invited to address it on the validity or otherwise of the *nolleprosequi* above, Idoko, J the trial High Court Judge in his Judgment delivered on 2 June 1980 held that the provision of section 191(3) of the Constitution above (now section 211(3) of the Constitution) is not a mere re-statement of existing principles, but a solemn provision to be complied with by the Attorney-General of a State and that evidence of such compliance must be shown. The learned Justice Idoko, further, held that, in the instant case, the Attorney-General of Benue State did not have regard to the provisions of section 191(3) of the Constitution above before he acted under section 191(1)(c) of the same and it followed that he had not properly entered a *nolleprosequi* to free the accused/respondents.

Being aggrieved by the Judgment of the trial High Court, the appellant/prosecution appealed to the Court of Appeal which reversed the Judgment of the trial High Court. The Court of Appeal (per Adenekan Ademola, JCA) held that section 191(3) of the Constitution above which governs the exercise of the power of the State Attorney-General, regarding matters stated in section 191(1) of the Constitution above (now section 211(1) of the Constitution), does not make any difference to the exercise of the power to enter a *nolleprosequi* by the same on the ground that the section was merely re-stating factors which the same would have borne in mind, at any rate, in discharging his legal functions, so that the directive contained in section 191(3) above are merely for the guidance of the same and not limitations of his powers. His Lordship concluded that the trial High Court Judge was wrong to have held that, in the instant case, the Benue State Attorney-General would have stated expressly under section 191(3) above,

the reasons which had guided the same in entering a *nolleprosequi* in the case. According to the learned Justice Ademola, the *nolleprosequi* filed in the suit before the trial High Court Judge was in order and proper.

Also, *The State v Samuel Ilori and Two Others*,[25] is another selected and important case in point. In the case, the Attorney-General of Lagos State, relying on section 191(1)(c) of the 1979 Presidential Constitution, entered a *nolleprosequi* on 9 June 1980 to free one Samuel Ilori, the DPP of Lagos State as well as one Wodi and one Tano, the first respondent/accused as well as the second and third respondents/accused, respectively being prosecuted privately at the High Court of Lagos State by one Fred Egbe, the appellant a Lagos Lawyer for the offences of conspiracy to bring false accusations against him and conspiracy to injure him in his trade or profession, contrary to sections 125 and 518(4) of the Criminal Code Law of Lagos State.[26] This came about after the Court of Appeal had quashed an information filed by the first respondent/accused to prosecute the appellant for the offences of stealing and inducing delivery of money by false pretences, contrary to sections 390 and 419 of the Law above and the Attorney-General above had declined appellant's request to prosecute the respondents/accused, including the second and third respondents/accused who were the two Police officers that investigated the case against the appellant. The trial High Court upheld the *nolleprosequi*.

Being aggrieved by the decision of the trial High Court, the appellant appealed to the Court of Appeal, on the ground that the

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25 [1984] 5 NCLR 52.

26 Cap 31 Laws of Lagos State 1973.

trial High Court should have taken evidence and examined his allegations against the Attorney-General of malice and extraneous considerations in pursuance of the provisions of section 191(3) of the 1979 Constitution (now sections 174(3) and 211(3) of the Constitution). Justice Kazeem, JCA (as he then was) delivering the leading judgment of the Court of Appeal with which the other two Justices of the Court who sat in the appeal concurred, dismissed the appeal of the appellant. His Lordship held that the *nolleprosequi* was in order and the appellant did not obtain the leave of the Judge of the High Court before filing his papers for private prosecution an issue which the Court of Appeal took up on its own. The learned Justice Kazeem, re-iterated the provisions of section 191 of the 1979 Presidential Constitution (now sections 174 and 211 of the Constitution) and expressed the opinion that the Nigerian courts in the exercise of their wide powers under section 6(6)(b) of the 1979 Presidential Constitution could question the Attorney-General's power of *nolleprosequi* and grant appropriate remedies when an aggrieved person, who had complained of an infraction of his fundamental right by the Attorney-General or that the same failed to have regard for the safeguards contained in section 191(3) above, could prove that the same had acted out of improper motive or ill-will.

Being aggrieved by the judgment of the Court of Appeal, the appellant appealed to the Supreme Court. Justice Kayode Eso, JSC delivering the leading judgment of the Supreme Court with which the other Justices of the Court who sat in the appeal concurred, dismissed the appeal of the appellant. His Lordship affirmed the decision of the Court of Appeal, but over-ruled its opinion expressed to the effect that the court could question the Attorney-

General's power of *nolleprosequi* when it is proved that the same had acted out of improper motive or ill-will.

His Lordship held that section 191(3) above had not altered the pre-1979 constitutional position of the Attorney-General, as the common-law pre-eminent and incontestable position of the Attorney-General is still preserved by section 191(1) above under which the same still had an unquestioned discretion in the exercise of his powers to institute or discontinue criminal proceedings. According to His Lordship, notwithstanding section 191(3) above, which the same considered to be a statement of the law up to 1979, the Attorney-General was still not subjected to any control in the exercise of his powers under section 191 above and except for public opinion and the reaction of his appointor, the Attorney-General was law unto himself, regarding the exercise of the said powers. Justice Eso concluded that the test to be adopted under section 191(3) above in examining the exercise of the Attorney-General's power of *nolleprosequi* under section 191(3) above, which the same likened to the test adopted in examining the exercise of his discretion prior to 1979, is subjective and it is the exercise of his discretion in accordance with his own judgment.

Finally, in the more recent case of *The State v Deepak Khilnani and Sushil Chandra*,[27] another selected and important case in point, the Attorney-General of Lagos State entered a *nolleprosequi* to free the defendants/accused persons, Indians with British citizenship standing trial at the High Court of Lagos State for cheating, felony, making false statements, and stealing, contrary to sections 421,

[27] (Unreported) Suit No. 1D/1544c/2015, ruling of Oluwatoyin Ipaye, J of the High Court of Lagos State, Ikeja delivered on 13 July 2017.

422, 436(9) and 490 (7) of the Criminal Code Law,[28] respectively relying on section 211(1)(c) of the Constitution. They allegedly supplied some equipment to a company in Lagos, Greenfuels Limited, through Gentec Limited. The invoices for the said equipment were allegedly-inflated by the defendants/accused who failed to account for the difference. On 13 July 2017, Ipaye, J the trial High Court Judge struck-out the charges against the defendants/accused and discharged the same. The learned Justice Ipaye held that the Attorney-General reserved the statutory power to initiate and discontinue a criminal proceedings in Lagos State, and that the Court could not review the Attorney-General's discretion. It should be noted that one Rosiji, the Chairman of Greenfuels Limited who was the complainant in the case had briefed one Olayinka Ola-Daniels a legal practitioner who filed in the case a brief of an *amicus curiae,* meaning a friend of the court such as a legal practitioner. Ola-Daniels and 27 other civil society lawyers had protested in open court against the discontinuance of the case but to no avail.[29]

The author is of the view that the decision of the Court of Appeal in the *Akor* case, the decision of the Supreme Court in the *Ilori* case as well as the decision of the High Court in the *Khilnani* case are not acceptable. It is the author's humble view that the Court of Appeal,

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[28] Cap C 17 Laws of Lagos State 2011.

[29] <https://allafrica.com.stories> accessed 29 April 2020. Note, also, that in *Attorney-General of Kaduna State v Umaru Hassan* [1985] NWLR (pt 8) 483, the Supreme Court of Nigeria (per Ayo Irikefe, JSC) held correctly that the Solicitor-General of Kaduna State could not validly exercise the power of the Attorney-General to enter a *nolleprosequi* in criminal proceedings under s 191(1)(c) of the 1979 Presidential Constitution in the absence of an incumbent in the office of the Attorney-General or when there was no substantive Attorney-General of Kaduna State.

Supreme Court and High Court above are wrong for the ensuing reasons. First, the power of *nolleprosequi* bestowed on the Attorney-General under sections 160(1)(c) and 191(1)(c) of the 1979 Presidential Constitution (now sections 174(1)(c) and 211(1)(c) of the Constitution) is not an unquestionable or absolute constitutional power as decided by the Supreme Court of Nigeria in the *Ilori* case. This can be discerned from the express provisions of the 1979 Presidential Constitution or the stand point of constitutional supremacy.[30] It should be noted that section 1(1) of the Constitution above declares the same to be supreme and its provisions to have binding force on all persons and authorities, including the Supreme Court, throughout Nigeria. Put differently, the discretion the Supreme Court of Nigeria accorded the Attorney-General in the *Ilori* case is much too wide than the framers of the Constitution above had in mind.[31] It is true that when the Attorney-General begins a prosecution before a court he is not obliged to disclose to the court such reasons as are within matters specified in sections 160(3) and 191(3) of the 1979 Presidential Constitution or sections 174(3) and 211(3) of the Constitution or when the Attorney-General continues or takes -over a prosecution begun by someone else, he is not obliged to disclose to the court such reasons that have compelled him to take-over the prosecution, as pointed out by the Court of Appeal in the *Akor* case. In any event, the Court above was not correct to have held that the directive in

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[30] See OH Tobechukwu and SC Chukwuma, 'Rethinking the Power of *NolleProsequi* in Nigeria: The case of *State v ILori'* (2014) 2(1) *Global Journal Politics and Law Research* 8

[31] See EB Omorogie, 'Power of the Attorney-General over Public Prosecution under the Nigerian Constitution: Need for a Judicial Restatement', *University of Benin*, Faculty of Law, Lecture series No 4 November 2004, 7.

section 191(3) above are merely for the guidance of the Attorney-General and not limitations of his powers.[32]

A point to note is that under sections 6(6)(a) and 6(6)(b) of the 1979 Presidential Constitution (now sections 6(6)(a) and 6(6)(b) of the Constitution) the courts established for the Federation and a State, including the Supreme Court, Court of Appeal and State High Court are bestowed with all inherent powers and sanctions of a court of law and with powers to adjudicate over or hear all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto for the determination of questions regarding the civil rights and obligations of that person, respectively.[33] The provisions of sections 6(6)(a) and 6(6)(b) as well as sections 160(3), 191(3), 174(3) and 211(3) above suggest that upon a complaint by the complainant or defendant or an *amicus curiae* or any aggrieved person that the Attorney-General in the exercise of any of his powers under sections 160, 191, 174 and 211 above acted in breach of any of the fundamental rights guaranteed to Nigerians under Chapter Four of the 1979 Presidential Constitution and the Constitution or out of improper motive or ill-will, the court can inquire into such compliant and grant relevant remedies if the Attorney-General could not satisfy the court that the exercise of

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[32] Note that the stance of the Court of Appeal is supported by some learned Nigerian writers. For example, see GO Etose, JU Aziegbemhin and PU Aghede-Ehikwe, 'An Appraisal of the Application of the Doctrine of *NolleProsequi* in Nigeria' (2018) 8(1) *Cranebrook Law Review* 13 and JO Akande, *Introduction to the Constitution of Nigeria* (Lagos: MIJ Professional Publishers Ltd., 2000) 321.

[33] See, also, *MusaBaba-Panya v President of the Federal Republic of Nigeria and Two Others* [2018] 15 NWLR (pt 1643) 395, 401-02, Court of Appeal (CA).

any such powers in a particular criminal proceedings is in the public interest and so on.[34] The Court of Appeal was, therefore, correct in stating in the *Ilori case* to the effect that the court could question the Attorney-General's power of *nolleprosequi* when it is proved by an aggrieved person that the Attorney-General had acted out of improper motive or ill-will. The problem with the Supreme Court in the *Ilori* case is that it placed heavy reliance on the common-law position, regarding the Attorney-General. It is argued that the apex Court above ought not to have placed such heavy reliance on the position under the common-law, where it is settled that the exercise of the power of *nolleprosequi* by the Attorney-General cannot be questioned by the court whether the Attorney-General acted wrongly or not,[35] in its decision to over-rule the Court of Appeal on its position.

A significant point to bear in mind is that Nigeria has deliberately created the Office of Attorney-General under its Constitution. Also, it has deliberately bestowed the common-law powers of the Attorney-General with respect to prosecution of criminal cases and *nolleprosequi* on the Attorney-General under its Constitution. These implicate that Nigeria intends that its Constitution and not the common-law should be the law with regard to the establishment of the Office of the Attorney-General as well as the prosecution of criminal cases and the exercise of the power of *nolleprosequi.*

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[34] See the decision of the Supreme Court of Nigeria in *Mohammed Sanni Abacha v The State* [2002] 11 NWLR (pt 779) 437 or [2002] LPELR 16.

[35] See, for example, *The Queen on the Protection of JD Tomlinson v Comptroller- General of Patents Designs and Trade* [1899] 1 QB 914; *London County Council v The Attorney-General* [1902] AC 165, 168-69; *The Queen v Allen* [1862] 121 ER 929; and *Alfred Njau and Others v City Council of Nairobi* [1982-1988] 1 KAR 229. 4. See, also, Akande, see n 32 above, 319-20.

Without doubt, the common-law, together with statutes of general application that were in force in England on 1 January 1900 and the doctrines of equity still form part of Nigerian Law.[36] This is by virtue of the reception laws.[37] However, where there is a conflict between the common-law and Constitution of Nigeria with respect to a subject-matter, the Constitution of Nigeria prevails. This is so, because there is a presumption that in providing in the Constitution different provisions on a subject-matter other than the position at common-law, Nigeria does not intend that the position under the common-law should be the governing law with respect to such a subject-matter. Besides, the Constitution is the supreme law in Nigeria by virtue of section 1(1) of the Constitution. Where any law, including the common-law is inconsistent with the Constitution, the Constitution prevails and that other law shall to the extent of its inconsistency be void, going by section 1(3) of the Constitution. This view is fortified by the decision of the Supreme Court of Nigeria in *Efunwape Okulate v Gbadamasi Awosanya*[38] and *Attorney-General of Abia State v Attorney-General of the Federation*.[39]

The foregoing discourse reveals that both the Office of the Attorney-General and its legal functions in Nigeria are not derived from the common-law. Rather, they are derived from the Nigerian Constitution. If the Parliament in Nigeria had wanted Nigeria to stick to the position at common-law with respect to the power of *nolleprosequi* it would not have provided for the Office of

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[36] See, for example, the Interpretation Act Cap 123 LFN 2004, s 32(1).

[37] Note that the history of reception laws in Nigeria dates back to Ordinance No 3 of 1863 which introduced English Law into the Colony of Lagos.

[38] [2002] FWLR (pt 25) 1666, 1671.

[39] [2002] 6 NWLR (pt 763) 264.

Attorney-General and the legal functions of the same in the Nigerian Constitution. In this way, it is the provisions of the Nigerian Constitution that must be considered in determining whether the Attorney-General has an unquestioned discretion or unchallengeable authority in the exercise of his power of *nolleprosequi.* An important point to note is that the provisions of sections 191(3) and 211(3) above are mandatory with the compulsory 'shall'. On construction of the word 'shall' when used in a statute, the Nigerian Court of Appeal in the case of *John Echelunkwo and 90 Others v Igbo-Etiti Local Government Area*[40] stated as follows:

> Whenever the word 'shall' is used in an enactment, it denotes imperativeness and mandatoriness. It leaves no room for discretion at all. It is a word of command; one which always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning. It has the invaluable significance of excluding the idea of discretion and imposes a duty which must be enforced.

In a similar manner, the Nigerian Court of Appeal stated in the *Baba-Panya* case thus:

> Whenever the word 'shall' is used in a statute and indeed the Constitution, it presupposes a compulsory action, conduct or duty. It admits of no discretion whatsoever.

The pronouncements of the Court of Appeal above implicate that the Attorney-General in exercising his power of *nolleprosequi* must

[40] [2013]7 NWLR (pt 1352)1, 8

take into consideration the public interest, the interest of justice and the need to prevent abuse of legal process and that these requirements must be enforced by law enforcement agencies, including the court.

Public interest is cardinal to policy debates, politics, democracy and the nature of the government itself.[41] *The Black's Law Dictionary* defines 'public interest' as: 'the general welfare of the public that warrants recognition and protection or something in which the public as a whole has a stake…'[42] In short, public interest has to do with the common well-being or general welfare.[43] Interest of Justice means in the furtherance of justice. The word 'Justice' can be defined to mean 'equity, fairness or impartiality'.[44] It, also, means 'the quality of being fair or reasonable'.[45] The expression 'interest of Justice' refers generally to the cause of fairness, equity or impartiality or reasonableness.[46] While the expression 'abuse of legal process' refers to the use of legal process to accomplish an unlawful purpose or improper use of a civil or criminal legal procedure for an unintended, malicious or perverse reason.[47] It is argued that where it is proved by a complainant or defendant or an *amicus curiae* or any other aggrieved person that the Attorney-

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41 Damola, see n 12 above, 254.

42 Garner, see n 2 above, 1266.

43 Damola, see n 41 above.

44 <https://www.quora.com/what-does-interests-of-justice-mean> accessed 27 May 2020.

45 P Philips et al (eds), *AS Hornsby's Oxford Advanced Learner's Dictionary-International StudentsEdition* (Oxford: 8th edn, Oxford University Press, 2010) 13.

46 See n 44 above.

47 <https:illegal-dictionary.thefreedictionary.com/abuse of process> and <https://definitions.uslegal.com/a/abuse-of-process> accessed 27 May 2020.

General had not taken into consideration the public interest and so on, but acted instead out of improper motive or ill-will, the court has the power to reject the exercise of the power of *nolleprosequi* by the Attorney-General in a particular criminal proceedings. It is mind-boggling why the trial High Court in the *Khilnani* case did not reject the exercise of the power of *nolleprosequi* by the Attorney-General of Lagos State in the case above. It has been indicated already that Ola-Daniels and 27 other civil society lawyers had protested in open court against the discontinuance of the case by the Attorney-General of Lagos State but to no avail. They, correctly, argue that the said Attorney-General did not take into consideration the public interest and the interest of justice, as mandated in section 211(3) of the Constitution in the circumstances of the case before he acted under section 211(1)(c) of the Constitution and therefore he had not properly entered a *nolleprosequi* in the case above.[48]

Second, the apex court in the *Ilori* case had suggested that where the Attorney-General had abused the exercise of his power of *nolleprosequi* under the Constitution there is nothing the court could do about it, but that he must be left to his appointor and public opinion. Indeed, this is a re-statement of the position at common-law. It should be noted that the Attorney-General's appointor, the president or governor is not likely to remove or sanction the Attorney-General, as, often times, the power of *nolleprosequi* is exercised by the Attorney-General at the instance of the appointor. Also, unlike the situation in the developed nations such as the UK where public opinion may compel a public officer to resign his office, the situation in Nigeria is such that public

[48] <http://www.allafrica.com/stories> accessed 20 April 2020 and <http://www.vanguardngr.com> accessed 20 April 2020.

officers hardly resign their offices in the face of adverse public opinion. Many Nigerian public officers actually take public opinion less seriously. In this way, public opinion may not weigh on the mind of the Attorney-General who wishes to abuse the power above. Besides, in Nigeria, the State is obligated under section 15(5) of the Constitution to abolish corrupt practices and abuse of power. This section is contained in Chapter Two of the Constitution, dealing with 'Fundamental Objectives and Directive Principles of State Policy'. Although section 15(5) and other provisions under Chapter Two above have been rendered non-justiciable by virtue of section 6(6)(c) of the Constitution,[49] it shall be the duty and responsibility of all organs of government, including the courts to conform to, observe and apply the provisions of Chapter Two above,[50] of which section 15(5) is a part.

Third, the Supreme Court can be vilified for taking the stance that the test to be adopted under section 191(3) above in examining the exercise of the Attorney-General's discretion with regard to the exercise of his power of *nolleprosequi* under the 1979 Presidential Constitution is subjective and it is the exercise of his discretion, according to his own judgment. It is contended that a decision that can negatively impact on the civil rights and obligations of a citizen of Nigeria, including any question or determination by or against any government or authority cannot be reached subjectively.

An important point to bear in mind is that the power to exercise a *nolleprosequi* in criminal proceedings under section 191(1)(c) of the 1979 Presidential Constitution or section 211(1)(c) of the

[49] See the *Baba Panya* case. Note that the position above is in tune with what obtains in other countries. See, for example, art 37 of the Constitution of India 1949.

[50] See s 13 of the Constitution and the *Baba-Panya* case. See, also, the Constitution of India 1949, art 37.

Constitution is a quasi-judicial function which must be done objectively and in which the court of law should look into and that is the basic reason why it has been contended above that the Attorney-General in exercising the power of *nolleprosequi* bestowed on him by the sections above must in doing so have regard to the public interest and so on. This is so, because if the Attorney-General continues to enjoy this absolute or wide-discretionary power of *nolleprosequi,* as suggested by the apex Court in the *Ilori* case there is no gain-saying the fact that this can engender manifest misuse of power, contrary to section 15(5) above, as he tries to protect or shield relatives, friends and political associates.

In the *Ilori* case, for example, the right of the appellant to public participation in the Government of Nigeria through accessibility to the court, as guaranteed under sections 14(2)(c) and 17(2)(e) of the 1979 Presidential Constitution (now sections 14(2)(c) and 17(2)(e) of the Constitution) was denied. Actually, the prosecution of the respondents/accused for allegedly committing offences under the Criminal Code Law of Lagos State above is the public duty of the Lagos State Government which is to be exercised by the Attorney-General of Lagos State who is in-charge of public prosecution in Lagos State under section 191(1)(a) of the 1979 Constitution above(now section 211(1)(a) of the Constitution). The appellant in the *Ilori* case was merely engaging in public participation in the Government of Lagos State a Government of Nigeria to ensure that the officers above who were alleged to have committed offences under the Criminal Code Law above are prosecuted and punished if found wanton or guilty. It needs to be pointed out that the power to

initiate criminal prosecution by a private prosecutor is a right recognised by the Constitution and other laws of Nigeria.[51]

The appellant's fundamental right to a fair hearing, guaranteed by the common-law rules of natural justice, as disclosed earlier, section 33(1) of the 1979 Presidential Constitution above (now section 36(1) of the Constitution), was also denied. In other words, he was not allowed or given the opportunity to state his own case against the respondents/accused in the Lagos State High Court. In short, the apex Court failed to give due cognisance or regard to the fundamental right of a Nigerian citizen to a fair hearing, as embedded under section 33(1) of the 1979 Presidential Constitution.

A good admonition to make is that due cognisance or regard must be given to the right of access to the court guaranteed to every Nigerian by section 17(2)(e) above and the fundamental rights guaranteed to every Nigerian under Chapter Four of the Constitution of which the right to a fair hearing guaranteed in section 36 above is a part. Arguably, Chapter Two provisions, including sections 14(2)(c), 15(5) and 17(2)(e) above constitute the basis of the social contract between the citizens of Nigeria and governmental leaders. Little wonder, all governmental organs, including the courts are mandated to conform, observe and apply its provisions, as disclosed above. In addition to this, the provisions of Chapter Four of the Constitution, dealing with 'Fundamental Rights', of which section 36 is a part, are sacrosanct, hence; the Constitution provides for a difficult and tedious procedure for the amendment of any of the provisions in its section 9(3). The nation,

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[51] See, for example, ss 174(1)(b) and 211(1)(b) of the Constitution as well as s 106 of the Administration of Criminal Justice Act 2015.

in this light, must apply, and show respect for, the Constitution. The rights above are, also, guaranteed under international law. For example, the Charter of the United Nations (UN) 1945 guarantees human rights of persons, including the right to a fair hearing. Also, the Universal Declaration of Human Rights (UDHR) 1948 guarantees the right to a fair and public hearing and other fundamental rights in its Articles 3 to 20. Although the UDHR is a soft law agreement and not a treaty itself and thus not legally-binding on member-nations of the UN, including Nigeria, it has become customary international law that has been adopted across the world towards protection of human rights.[52]

Furthermore, the UN International Covenant on Civil and Political Rights (ICCPR) 1966 guarantees to every person the fundamental right to a fair hearing and the right to take part in the conduct of public affairs directly in its Articles 14(1) and 25, respectively. It is argued that the ICCPR now has the effect of a domesticated enactment, as required under section 12(1) of the Constitution and, therefore, has force of law in Nigeria, since the same guarantees labour rights such as in its Article 22(1) and has been ratified by Nigeria.[53] Again, the African Union (AU) African Charter on Human and Peoples' Rights (ACHPR) 1981 guarantees to every person the fundamental right to be heard and the right to participate freely in the government of his country directly in accordance with the provisions of law in its Articles 7 and 13(1), respectively. The Charter has, not only be signed and ratified by Nigeria but has, also

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[52] See KM Danladi, 'An Examination of Problems and Challenges of Protection and Promotion of Human Rights under European Convention and African Charter' (2014) 6(1) *Port Harcourt Law Journal* 83.

[53] AE Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse (2017) 7(1) *East African Journal of Science and Technology* 121-22.

been made a part of National law, as enjoined by its provisions and section 12(1) of the Constitution.[54] In *Sanni Abacha v Gani Fawehinmi*,[55] the Supreme Court of Nigeria held that since the African Charter above had been incorporated into Nigerian law, it enjoyed a status higher than a mere international convention and the same was part of the Nigerian *corpus juris,* meaning body of laws.

Anyhow, as a member of the UN and AU as well as State-Party to the ICCPR and ACHPR, Nigeria is obligated to apply the provisions of the international human rights' instruments above. The nation, in this instance, must show respect to international law and its treaty obligations, as enjoined by section 19(d) of the Constitution.

In the final analysis, the decision of the Court of Appeal in the *Akor* case, the decision of the Supreme Court in the *Ilori* case and the decision of the High Court in the *khilnani* case on the matter are null and void. This argument is hinged on the insightful provision in section 1(3) of the 1979 Presidential Constitution or section 1(3) of the Constitution. Perhaps, the Justices of the Court of Appeal and Supreme Court as well as the Judge of the High Court would have come to a different conclusion, if they had adverted their minds to the points above.[56]

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[54] See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 LFN 1990 (now Cap A9 LFN 2004).

[55] [2000] 6 NWLR (pt 660) 228, 251.

[56] For an incisive discourse on the *ILori* case and criticisms of the decision of the Supreme Court in the case, see Tobechukwu and Chukwuma as well as Omorogienn 30&31 above and BO Igwenyi, 'Jurisprudential Appraisal of *NolleProsequi* in Nigeria'(2016) 4 (4) *Global Journal of Politics and Law Research* 10-19. Note that Nigeria is not the only country practicing the

One problem with the judiciary in Nigeria is that many of the judges in Nigeria seem to be oblivious of the import and purport of the right of citizens of Nigeria to participate in their government in accordance with the provisions of the Constitution, such as having easy accessibility to the courts of law or justice and fundamental rights, including the right to a fair hearing, guaranteed to all citizens of Nigeria by the Constitution and international human rights' norms and treaties, as disclosed before. Also, the judges capitalise on the fact that the Constitution does not expressly subject the exercise of the power of *nolleprosequi* by the Attorney-General to the control or approval of the Court. Furthermore, the courts in Nigeria, particularly the Supreme Court of Nigeria are reluctant to reject the exercise of the power of *nolleprosequi* by the Attorney-General because the exercise of the same is considered an absolute or wide-discretionary power of the Attorney-General.

Lastly, many of the judges in Nigeria belong to the ruling capitalist class.[57] These judges administer justice in consonance with the

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common-law and constitutional democracy that still sticks to the position of the Attorney-General under the common-law, going by the decision of the courts above. This is, also, the position in Malaysia and Singapore. Both nations are, also, practicing the common-law and constitutional democracy. These States have, also, provided in their constitutions the power of the Attorney-General to enter a *nolleprosequi* in criminal proceedings. A relevant case to note is the Singaporean case of *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476, quoted in GC KOK Yew, 'Prosecutorial Discretion and the Legal Limits in Singapore' (2013) 25 *Singapore Academy of Law Journal* 15, where the Court of Appeal (per VK Rajah, JA) upheld the unquestionable or absolute constitutional powers of the Attorney-General of Singapore to institute, conduct and discontinue any proceedings for any offence.

57 O Oni, '*Towards a Socialist Political System for Nigeria* (Ibadan: Progress Books Nigeria Ltd 1996), quoted in AE Abuza, 'The Problem of Vandalization of Oil Pipelines and Installations in Nigeria: A Sociological Approach' (2007) 2(2) *Delsu Law Review* 276.

capitalist jurisprudence.[58] In actuality, they exist to ensure that every citizen conforms with the requirement of bourgeois law which seeks to preserve and defend the capitalist relations which prevail in the society.[59]

To sum-up on the issue of analysis of case-law on the power of the Attorney-General to enter a *nolleprosequi* under the 1999 Nigerian Constitution, it is not out of context to stress that the behaviour of an Attorney-General in entering a *nolleprosequi* in criminal trials for his selfish interest or political considerations and so on is, certainly, amoral, against legal ethics or unethical, unconstitutional and unlawful, going by the dictionary definitions of amoral, legal, ethics, unethical, unconstitutional and unlawful. [60]

The following five problems associated with the exercise of the constitutional power of *nolleprosequi* by the Attorney-General may be relevant to note:

(i) The cumulative effect of entering a *nolleprosequi* in criminal trials by the Attorney-General at common-law is not an acquittal but a discharge and does not operate as a bar to subsequent trial of the accused.[61]The effect is, certainly, unfair; particularly when the *nolleprosequi* of the Attorney-General is entered on the day of judgment or before judgment after all prosecution witnesses might have testified. No doubt, a lot of time and resources would have been expended or wasted by the accused person at that stage, given the nature of criminal trials in Nigeria which are

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58 *Ibid.*

59 *Ibid.*

60 Philips, see n 45 above, 45, 500, 849, 1618, 1626 & 1631.

61 See *Clark and Others v Attorney-General of Lagos State* [1986]1 QLRN 119.

characterised by frequent, and often unending, adjournment of cases.

(ii) The Supreme Court of Nigeria held in the *Ilori*case that section 191(1)(c) above (now section 211(1)(c) above) confer absolute or wide-discretionary power of *nolleprosequi* on the State Attorney-General. Akanle, correctly, criticises the conferment of wide-discretionary powers on public officers.[62] This is so, mainly because such powers are susceptible to misuse.

(iii) The constitutional power of the Attorney-General in Nigeria to enter a *nolleprosequi* in criminal proceedings is being misused. There are many illustrations to demonstrate this point. These include: (a) the case of Julius Makanjuola, former Permanent Secretary in the Ministry of Defence and four other accused who were Directors in the Ministry, where, on 22 July 2002, the Federal Attorney-General entered a *nolleprosequi* to free the five accused persons who were standing trial in an Abuja High Court for fraud and embezzlement of public funds amounting to ₦420 million, relying on section 174(1)(c) above.[63] A great public outrage followed the action of the Federal Attorney-General in the case above;[64] (b) the case of Mohammed Abacha son of late former Military Head of State of Nigeria General Sanni Abacha, where, on 20 June 2014, the Federal Attorney-General entered a *nolleprosequi* to free Abacha's son standing trial in the High Court of the Federal Capital Territory (FCT), Wuse over the role he allegedly-played in the stealing of about ₦446.3 billion belonging to the Federal Government of Nigeria (FGN) between 1995 and 1998,

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62 O Akanle, 'Pollution Control Regulation in Nigerian Oil Industry' published as Occasional Paper 16 by the Nigerian Institute of Advanced Legal Studies, Lagos 1991 14.

63 http://www.allafrica.com/stories, see n 48 above.

64 *Ibid.*

relying on section 174(1)(c) above;[65] (c) the case of Bola Ige who was Attorney-General of the Federation, where, on 19 July 2004, the Oyo State Attorney-General entered a*nolleprosequi* to free the four accused persons, including some Peoples Democratic Party (PDP) members who were standing trial in the Oyo State High Court, Ibadan for conspiracy and murder of Ige, relying on section 211(1)(c) above; [66] and (d) the cases of *Akor, ILori* and *Khilnani,* where the State Attorney-General entered a *nolleprosequi* to free accused persons standing trial in the State High Court, relying on sections 191(1)(c), 191(1)(c) and 211(1)(c) above, respectively. In the *Khilnani* case, there was, also, a great public outrage which followed the *nolleprosequi* entered by the Lagos State Attorney-General to free the accused persons. The development actually elicited wide-spread condemnation and protests, especially by workers of Greenfuels limited a Nigerian company from which the two accused persons allegedly diverted the amount above, as disclosed before.[67]

(iv) The Attorney-General in Nigeria acts in his professional capacity as law officer as well as a politician occupying the office of Minister of Justice or Commissioner for Justice and member of the Executive Council. He is bound to take instructions, in the exercise of his prosecutorial powers, from the person who selected him for the appointment and who can remove him from office, that is the president or governor.[68] A relevant popular saying is: 'he who pays the piper dictates the tune'.

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65 <http://www.thetalkparlour.com>fg-files for nol…> accessed 20 April 2020.

66 <http://www.nigerianlawguru.com/../ THE% 20 STATE% 200 F %20 CRIMINAL% 20 JUSTICE and <http://allafrica.com/stories/200407200157 html> accessed 21 August 2018

67 http://www.vanguardngr.com, see n 48 above.

68 Damola, see n 43 above, 250.

(v) The abuse of the power to enter a *nolleprosequi* in criminal trials by the Attorney-General does not augur well for the current anti-corruption 'war' or 'fight' or campaign embarked upon by the civilian administration of President Muhammadu Buhari. The war or fight above cannot deter members of the Nigerian society from engaging in criminal activities or corrupt practices or be won when criminal or corrupt elements in the Nigerian society are being set-free and allowed to re-unite with innocent members of the Nigerian public under the subterfuge of *nolleprosequi* entered by the Attorney-General in criminal trials under the Constitution. It is very sad that, in Nigeria, laws that have been put in place to safeguard the interest of all citizens and for the protection of all members of the society are being twisted and manipulated to safeguard the interest of, and or protect, the few strong, capitalists or bourgeoisie and powerful members of the society through the instrumentality of the power of *nolleprosequi* exercisable by the Attorney-General. No doubt, man seems to be returning back to his situation under the *Hobbesian* state of nature where life was short, nasty and brutish and there was survival of the fittest, as the few strong and powerful members of the society took over the properties, lives and wives of the majority weak and less-powerful members of the society without any sanction or punishment, going by the view- points of the social contract theorists like Thomas Hobbes, John Locke and Jean Jacques Rousseau.[69]

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[69] It was in these circumstances, according to the social contract theorists, that men in the state of nature came together and contracted with one another to surrender their right to govern themselves to a group of persons in the society constituting the government for the purpose of ruling over or governing them, provided their fundamental rights, including rights to life and properties were protected. See AE Abuza, 'Environmental Law: Post-Rio Discussions on Environmental Protection-A Reflection', BC Nirmal and RK Singh (eds),

Notwithstanding the foregoing, it is argued that the exercise of the constitutional power of the Attorney-General to enter a *nolleprosequi*is still desirable in contemporary Nigerian democratic society. It is significant to bear in mind that the prosecutorial powers of the Attorney-General, including the power to enter a *nolleprosequi* in criminal proceedings under the Constitution are both sensible and necessary for the proper and orderly management of contemporary Nigerian society. In the UK, a *nolleprosequi*, in practical terms, was confined originally to two classes or needs, that is: (i) to dispose of technically-imperfect proceedings instituted by the British Crown; and (ii) to put a halt to oppressive but technically-impeccable proceedings instituted by private prosecutors.[70] Over time, a third class or need was added, that is cases where after the indictment had been signed, it is discovered that the accused person, for reasons bordering on sickness or other medical reasons, is unlikely ever to be fit to stand trial and there is no other way of doing away with the indictment.[71] These needs cannot be dispensed with. They are, indeed, still critical for the survival and growth of the system of administration of criminal justice in Nigeria.

Observations

It is glaring from the foregoing reflection on the power of the Attorney-General to enter a *nolleprosequi* under the Constitution that sections 174(1)(c) and 211(1)(c) of the Constitution bestow on

Contemporary Issues in International Law- Environment, International Trade, Information Technology and Legal Education (Singapore: Springer Nature Pte Ltd 2018) 94. See, also, https://www.britannica.com>topic, accessed 12 June 2020.

70 Damola, see n 68 above, 250.

71 Quoted in *Ibid.*

the Federal and State Attorneys-General the power of *nolleprosequi* in criminal proceedings. In the *Ilori* case, the Supreme Court of Nigeria held that the power of *nolleprosequi* conferred on the Attorney-General by sections 160(1)(c) and 191(1)(c) of the 1979 Presidential Constitution (now sections 174(1)(c) and 211(1)(c) of the Constitution) is absolute or a wide-discretionary power. This is in tune with what obtains in other countries which practice the common law, including the UK, Malaysia and Singapore. It is observable that sections 174(1)(c) and 211(1)(c) above are being misused by some Attorneys-General in Nigeria to enter a *nolleprosequi* to free persons standing trial in court for serious criminal offences for their selfish interest or political considerations and so on instead of the public interest and much more. The resultant effect is that some of the rights guaranteed to all citizens of Nigeria such as the right of access to the court, guaranteed under section 17(2)(e) of the Constitution and soon have been unduly eroded under the guise that the *nolleprosequi* entered by the Attorney-General in some criminal proceedings was in the public interest and so on. A typical example is the *Ige* case, where, on 19 July 2004, the Oyo State Attorney-General entered a *nolleprosequi* to free four persons, including some PDP members standing trial in the Oyo State High Court of Justice, Ibadan for conspiracy and the murder of Bola Ige. This unsatisfactory development is attributable, primarily, to the fact that the Constitution does not expressly subject the exercise of the power of *nolleprosequi* by the Attorney-General to the control or approval of the court or anybody or authority.

It is regrettable that the Nigerian courts have not been able to deal decisively with the problem above. Many of the courts in Nigeria, in this connection, have not been able to reject some of the exercise of the power of *nolleprosequi* by the Attorney-General in criminal

trials under the Constitution on the ground that they were not exercised in the public interest and so on. This is attributable to some factors. The author wishes to re-iterate the problems with the judiciary in Nigeria, as disclosed before. It is observable that the continued exercise of the power of *nolleprosequi* by the Attorney-General under the Constitution is still desirable in contemporary Nigerian democratic society. The truth is that the constitutional prosecutorial powers of the Attorney-General, are both wise and necessary for the proper, just and orderly management of contemporary Nigerian society. Needless to re-iterate the three needs which informed the introduction of the power of the Attorney-General to enter a *nolleprosequi* in criminal trials, as stated earlier. These needs cannot be dispensed with. In fact, they are still cardinal for the survival and growth of the system of administration of criminal justice in Nigeria.

It is amoral, against legal ethics or unethical, unconstitutional and unlawful to exercise the power of the Attorney-General to enter a *nolleprosequi* in criminal proceedings for his selfish interest or political considerations and so on. There is, therefore, an urgent need in Nigeria to address squarely five problems associated with the exercise of the constitutional power of *nolleprosequi* by the Attorney-General. The author wishes to re-iterate the five problems, as disclosed before.

A continuation of the problem above poses a grave danger to the survival of Nigeria. The sad effect of entering a *nolleprosequi* in criminal proceedings by some Attorneys-General for their selfish interest and so on which is unquantifiable cannot be underscored. It has, not only undermined but, also inhibited the effectiveness of Nigeria's practice of democracy or the rule of law a cardinal tenet

of a democratic system of government. The author wishes to recall the provisions of sections 43 and 44(1) of the Constitution. It should be re-iterated that the problem above has engendered the denial of the fundamental right of the accused person or persons and complainant such as the appellant in the *Ilori* case to a fair hearing, and the denial of the right of some Nigerian private prosecutors such as the appellant in the *Ilori* case to participate in the Government of Nigeria directly through accessibility to the court or take part in the conduct of public affairs directly or participate freely in the government of their country directly in accordance with the provisions of law, contrary to the law. The power to undertake private prosecution, as stated before, is a right recognised by the Constitution and other laws in Nigeria. The author has indicated earlier that the ICCPR now has the effect of a domesticated enactment in Nigeria while the ACHPR enjoys a status higher than a mere international convention, having been domesticated in Nigeria and the same is part of the Nigerian body of laws.

The entering of a *nolleprosequi* in criminal proceedings by some Attorneys-General for their selfish interest and so on has, again, impacted negatively on the country's system of administration of criminal justice. Of course, the problem above, if not quickly arrested has capacity to impact adversely on political stability. This is so, because citizens of Nigeria may capitalise on sections 39 and 40 of the Constitution which guarantee to them the rights to freedom of expression and peaceful assembly and association, respectively to embark on peaceful mass protests against the Nigerian Government over the misuse of the power of *nolleprosequi* by some Attorneys-General in Nigeria, as was the situation in the *Khilnani* case. This could engender instability in

Nigeria's democratic politics and thus encourage the military to foray into politics and take-over political power or governance in Nigeria like what transpired on 11 April 2019 in Sudan when soldiers seized political power from President Omar Hassan Al-Bashir of Sudan who had governed or ruled the North African country with iron-fist since 1989.[72] His ouster from political power was precipitated by the biggest peaceful demonstration culminating in a vast sit-in attended by many Sudanese citizens in Khartoum, the capital city of Sudan.[73] In actuality, the take-over 'capped' a season of protest and political crisis or tumult in North Africa. It should be re-called that much earlier, the governments of Hosni Mubarak, Ben Ali and Muamar Ghadaffi in Egypt, Tunisia and Libya, respectively were over-thrown by their people.[74] In Libya's case, Ghadaffi was killed in the process by his own people on 20 October 2011.[75] Nigerian leaders must learn lessons from these developments.

Of course, the Constitutions of many States, including Nigeria and the AU African Charter on Democracy, Elections and Governance (ACDEG) 2007 proscribe military or unconstitutional change of government.[76] A vital question to ask is: can a constitution prevent the people from over-throwing their governments if they so wish? The answer is in the negative. This is buttressed by the experiences in the countries above. The emphasis, therefore, must be on good governance and development, predicated on democratic ideals,

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72 <http://www.washingtonpost.com> accessed 23 April 2020.

73 *Ibid.*

74 <http://www/peoplesdailyonline.com/columni> accessed 11 November 2011.

75 *Ibid.*

76 See, for example, s 1(2) of the Constitution and art 23 of the ACDEG.

norms and values[77] which guarantee to citizens fundamental rights in consonance with international human rights' norms or treaties, including the UDHR, ICCPR, ACHPR and the Charter of the United Nations. The fight against criminality and corruption, as enjoined by the AU Convention on Preventing and Combating Corruption (AUCPCC) 2003 [78] is very critical. Also, ensuring access to the court of law or justice and peoples' participation in the government, as enjoined by the Constitution, the ICCPR and ACHPR are very critical. These are the real anti-dote to revolt or rebellion against the State or government.

The problem of misuse of powers of the Attorneys-General to enter a *nolleprosequi* must be given the highest consideration it deserves by the civilian administration of President Buhari. This must be the case so that the administration above may not be accused of paying lip-service to the issue of promoting- respect for the constitutional rights of Nigerians, respect for the rule of law as well as the fight against criminality and corruption.

Recommendations

The problem of some Attorneys-General in Nigeria entering *nolleprosequi* in criminal trials under the Constitution for their selfish interest or political considerations and so on under the guise or subterfuge of entering *nolleprosequi* in the public interest and so on should be effectively addressed or trackled in Nigeria. In order to surmount the problems associated with misuse of *nolleprosequi* powers, the following recommendations are made:

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77 Note that s 14(1) of the Constitution declares that Nigeria shall be a State based on democratic principles and social justice.

78 The Convention was adopted in Maputo, *Mozambique* on 11 July 2003.

(i) Sections 174(1)(c) and 211(1)(c) of the Constitution should be amended to subject the exercise of the power of *nolleprosequi* by the Attorney-General under the Constitution to the permission of the court.[79] It is in accord with what obtains in other countries, including the USA and Kenya.[80]

(ii) Sections 174 and 211 of the Constitution should be amended to, also, subject the exercise of the power of *nolleprosequi* by the Attorney-General under the Constitution to the provisions of a new sub-section to the effect that if the discontinuance of any proceedings under sub-section (1)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted. This is consistent with the practice in other countries like Kenya, as exemplified in Article 157(7) of the Constitution of Kenya 2010.

(iii) Nigeria should re-open criminal cases, where the Attorney-General had exercised the power of *nolleprosequi* under the Constitution for improper motive or ill-will since the commencement of the current democratic dispensation on 29 May 1999 with a view to re-arresting and re-arraigning the accused in court for the offences allegedly-committed against Nigeria in tune with the current 'war' or campaign embarked upon by Buhari's civilian administration against criminality and corruption. Good enough, President Buhari has already ordered the

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79 See, also, Damola n 71 above, 255.

80 See, for example, Rule 48 of the USA Federal Practice and Procedure Rules 1946, as amended in 2019, art 157 of the Constitution of Kenya 2010 and the Kenyan case of *Republic v MunehWanjikuIkigu* [2016] KLR. <http://www.kenyalaw.org>case law>cases>view> accessed 27 April 2020.

Inspector-General of Police (IGP) to re-open investigations into the murder case of Ige. [81]

(iv) Nigerians should seek sanctuary under sections 39 and 40 of the Constitution to organise Sudanese-style protests or demonstrations against a Nigerian capitalist government whose Attorney-General abuses the power of *nolleprosequi* under the Constitution as well as work assiduously towards the replacement of such a government. It should be noted that a revolt or rebellion against the government is justified in the face of violation of fundamental rights of citizens such as the rights to life and properties, according to social contract theorists.[82]

(v) Nigeria should insulate the office of the Attorney-General from partisan politics in tune with the practice in other countries like India.[83] To this end, the Constitution should be amended to separate the office of Attorney-General and Minister of Justice or Commissioner for Justice. While a person to be appointed Minister of Justice or Commissioner for Justice may be a card-carrying member of a political party, the appointee to the Office of Attorney-General should be an independent legal practitioner who is not a card-carrying member of a political party. He is to be elected into office by citizens under the Constitution on the basis of independent candidacy.[84]

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81 <http://www.vanguardngr.com>, see n 67 above.

82 Quoted by Abuza, see n 69 above, 97

83 <http://en.wikipedia.org/wiki/Attorney General of India> accessed 9 February 2016.

84 See Damola n 79 above, 256-57

(vi) The Nigerian Government should organise public lectures as well as other public enlightenment programmes to sensitise or interface with Nigerians, including judges and other members of the legal profession, on the import and or purport of the rights of citizens guaranteed under the Constitution.

(vii) The Nigerian Government should intensify or step-up the campaign or 'war' against criminality and corruption.

Conclusion

This article has reflected on the power of the Attorney-General to enter a *nolleprosequi* under the Constitution. It identified short-comings in the various applicable laws and stated clearly that the exercise of the constitutional power of *nolleprosequi* by some Attorneys-General in Nigeria for their selfish interest or political considerations and much more is amoral, against legal ethics or unethical, unconstitutional and unlawful and therefore ought to be subjected to the permission of the court. This article, also, highlighted the practice in other countries and proffered suggestions and recommendations, which, if implemented, could effectively address or end the problem of some Nigerian Attorneys-General seeking sanctuary under sections 174(3) and 211(3) of the Constitution to enter a *nolleprosequi* in criminal trials for their selfish interest or political considerations and so on instead of the public interest, the interest of justice and the need to prevent abuse of legal process.